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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-315

DAVID JOE WHITE

APPELLANT

VS.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DON A. WARD, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the within Brief for Appellee has been mailed, postage prepaid, to Hon. Timothy T. Riddell, Assistant Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601; Hon. Don A. Ward, Judge, Perry County Courthouse, Hazard, Kentucky 41701; and Hon. Tolbert Combs, Commonwealth Attorney, 33rd Judicial District, Courthouse, Hazard, Kentucky 41701 this 27th day of May, 1976.


Assistant Attorney General

FILED

MAY 27 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT

SUPREME COURT OF KENTUCKY

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHETHER THE APPELLANT IS ENTITLED TO BE
RESENTENCED.

COUNTERSTATEMENT OF THE CASE

Appellant David Joe White admits that he shot and killed George Deaton in Perry County, Kentucky on or about May 28, 1975. In his brief before this Court, appellant's counsel further admits that his client was fairly tried and found guilty of first degree manslaughter, KRS 507.030, on November 17, 1975 (Brief for Appellant, 1-4).

The only quarrel which appellant has with his conviction and sentence to ten years imprisonment turns upon his contention that the trial court did not follow the provisions of KRS 533.010 when it entered final judgment against him on November 25, 1975. Appellant insists that this "error" makes the judgment subject to vacation and that his case must, therefore, be remanded for the purpose of having the alleged statutory

insufficiency corrected. For the reasons stated below, appellee respectfully submits that appellant has both failed to demonstrate that the dictates of KRS 533.010 were ignored by the trial court and that he is entitled to any relief if, in fact, they were.

ARGUMENT

APPELLANT IS NOT ENTITLED TO BE RESENTENCED.

As the appellant states, KRS 533.010, passed as part of the new Kentucky Penal Code, is designed to encourage trial judges to strongly consider probation and conditional discharge as alternatives to imprisonment before ordering a defendant's commitment to a penal institution after conviction for most Code offenses. The statute is as follows:

"(1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation or conditional discharge as provided in this chapter.

"(2) Before imposition of a sentence of imprisonment the court shall consider the possibility of probation or conditional discharge. After due consideration of the nature and circumstances of the crime and the history, character and condition of the defendant, probation or conditional discharge should be granted unless the court is of the opinion that imprisonment is necessary for protection of the public because:

"(a) There is substantial risk that during a period of probation or conditional discharge the defendant will commit another crime; or

"(b) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or

"(c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime."

Since the "shall" of subsection 2 of the statute is presumptively mandatory, KRS 446.010 (29), appellant is probably correct in asserting that he had a statutory right to be considered for probation of conditional discharge even though he did not make any motion to that effect. But appellant has failed to demonstrate that he was not so considered.

Notwithstanding appellants facile supposition that the record herein discloses that the trial court ". . . failed to follow the requirements of KRS 533.010 in regard to whether or not appellant should have been probated" (Brief for Appellant, 3), the record is actually merely silent on this point. Since it is the general rule that every reasonable presumption should be indulged on appeal to sustain the verdict, judgment and sentence, 24A C.J.S. 675 "Criminal Law" § 1858, this Court is bound to conclude that the trial court followed the law in sentencing the appellant and gave fair consideration to the sentencing alternatives set out in KRS 533.010. Wright v. Commonwealth, Ky., 391 S.W.2d 685 (1965). Presuming from a silent record that statutory rights, as opposed to fundamental constitutional rights, have been fairly extended to or validly waived by a defendant is a traditionally respected and habitually followed practice.

Beyond the question of whether the trial court, in fact, followed the provisions of KRS 533.010 in sentencing the appellant, his failure to object to the sentencing procedures to which he was


subjected at any time prior to his presentation of the question on his appeal to this Court constitutes a waiver of any defect in the formality of those proceedings. RCr 9.22. Hansford v. Commonwealth, 170 Ky. 700, 186 S.W. 498 (1916); Crum v. Commonwealth, 284 Ky. 483, 144 S.W.2d 1047 (1940).

Finally, in view of the severity of the offense appellant committed, it is clear that neither probation nor conditional discharge would be appropriate in this case because any disposition other than imprisonment would "unduly depreciate the seriousness of the defendant's crime." Thus, on the face of this record which fails to reveal any extraordinary circumstances that might be cited in extenuation of appellant's crime, any error committed by the trial court in application of KRS 533.010 could have had no effect on appellant's substantial rights and should be disregarded. RCr 9.24.

CONCLUSION

For the above stated reasons, appellee respectfully submits that the judgment of the Perry Circuit Court is without reversible error and should be affirmed.

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